(6)



No. 92-1812

In The

# Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

*Petitioner,*

v.

PEDRO ALVAREZ-SANCHEZ,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF FOR RESPONDENT

MARIA E. STRATTON
Federal Public Defender
CARLTON F. GUNN*
Senior Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 894-2231

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831



64 pp

## QUESTIONS PRESENTED

I. WHETHER A CONFESSION IS SUBJECT TO SUPPRESSION UNDER 18 U.S.C. § 3501(c) WHEN THE CONFESSION IS GIVEN AFTER THE DEFENDANT HAS BEEN HELD IN CUSTODY BY STATE OFFICERS FOR OVER 2½ DAYS WITHOUT ARRAIGNMENT.

A. *Whether A Confession Is Subject To Suppression Under Section 3501(c) Based On Delay In Arraignment Alone When That Delay Exceeds Six Hours And Is Not Otherwise Reasonable.*

B. *Whether An Arrest By State Officers Qualifies As An "Arrest Or Other Detention In The Custody Of Any Law-Enforcement Officer Or Law-Enforcement Agency" Within The Meaning Of Section 3501(c).*

C. *Whether The Court Of Appeals Correctly Ruled That The Confession In The Present Case Should Be Suppressed.*

II. WHETHER THE COURT OF APPEALS' RULING IN THE PRESENT CASE SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT MR. ALVAREZ'S STATEMENT WAS MADE DURING A VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION.

A. *Whether the Exclusionary Rule Applies to Statements Made During Violation of The Right To A Prompt Probable Cause Determination.*

B. *Whether The Court Should Consider This Alternative Ground For Affirmance When The Issue Was Not Raised Below But There Was An Intervening Change In The Law.*

**QUESTIONS PRESENTED** – Continued

C. *Whether The Good Faith Exception To The Exclusionary Rule Applies Because The Officers Relied On A California Statute.*

1. Whether the officers complied with the requirements of the California statute.

2. Whether the good faith exception applies to reliance on permissive, as opposed to mandatory, statutes.

3. Whether the good faith exception applies when a reasonable officer would know there was a substantial risk his conduct violated a suspect's constitutional rights.



TABLE OF CONTENTS

TABLE OF CONTENTS – Continued





TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued



RULES AND STATUTES



MISCELLANEOUS

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued



## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, . . . ."

## STATEMENT OF THE CASE

Mr. Alvarez was arrested late on a Friday afternoon and not arraigned until the following Tuesday. Pet. App. 52a-53a, 57a. Despite the fact that counterfeit currency was found at the time of the arrest, *id.* at 54a, 57a, the Secret Service interrogation which elicited the statements at issue did not take place until approximately 11:30 a.m. on the Monday following the arrest, *id.* at 51a. At the time of the interrogation, therefore, Mr. Alvarez had been in custody for over 2½ days without an arraignment or any judicial determination of probable cause.

The detective in charge of the investigation claimed that he believed state law permitted a delay in arraignment until Tuesday, Pet. App. 57a, but Mr. Alvarez was never arraigned on state charges. Though another officer recalled being informed that prosecution would be declined by the district attorney, *id.* at 54a, the detective in charge indicated that the case was never presented to the district attorney and would have been presented only if the Secret Service decided not to prosecute Mr. Alvarez federally, *id.* at 59a. In any event, Mr. Alvarez was surrendered to Secret Service custody for arraignment on federal charges when the Secret Service indicated it wished to pursue such charges. *Id.* at 52a. The Secret Service was contacted pursuant to a Los Angeles County Sheriff's Department policy that the Secret Service be informed anytime counterfeit money is found. *Id.* at 57a.

The court of appeals held that 18 U.S.C. § 3501(c) required suppression of Mr. Alvarez's statement. The

court held that Section 3501(c) must be construed to permit suppression of a confession solely on the basis of pre-arraignment delay if the delay exceeded six hours and was not otherwise reasonable. Pet. App. 9a-10a. The court reasoned that a contrary interpretation of Section 3501(c) would violate the rule that a statute should be construed so as to give effect to each of its provisions. *Id.* The court also ruled, based on longstanding Ninth Circuit precedent, that the delay which must be taken into account under Section 3501(c) was the total period in both state and federal custody. *Id.* at 20a-21a & n. 8.

The court then applied the statute. While noting that there had been a delay in arraignment "from Monday afternoon to Tuesday morning" as a result of the interrogation, the court described the delay that mandated suppression as the delay "specifically to provide federal officers with time to interrogate [Mr. Alvarez]," not a delay which took place after the interrogation. Pet. App. 21a. The court concluded that this "avoidable and deliberate delay . . . , after a long period of custody, for the sole purpose of interrogating the arrestee" justified suppression of Mr. Alvarez's statement. *Id.* at 22a.

## SUMMARY OF ARGUMENT

The fundamental issue in this case is whether the government may place into evidence a confession obtained from a person arrested without a warrant and held in jail for 2½ days without being taken before a magistrate. Where, as here, there are no unusual circumstances which justify the delay, both 18 U.S.C. § 3501(c) and the Constitution require that such a confession be suppressed.

I. Section 3501(c) must be construed so that statements are subject to suppression solely on the basis of



delay when the delay exceeds six hours and is not otherwise reasonable. The plain language of Section 3501(c) describes the six-hour period as a "time limitation" and refers to the effect of delay on "[ ]admissib[ility]," not "voluntariness".

This plain language must be applied in addition to the general provisions of Section 3501(a) and Section 3501(b) regarding voluntariness. Both the rule that statutes should be construed so as not to render any part superfluous and the rule that specific provisions control over general provisions support such a construction. The original *McNabb-Mallory* rule applied to even voluntary confessions, and the legislative history of Section 3501(c) demonstrates that a compromise was reached during debate, whereby a limited form of the rule was retained for delays beyond six hours which were not otherwise reasonable.

The time limitation of Section 3501(c) begins to run from the time of arrest by state officers, moreover. Neither the statutory language, purpose, nor history suggests that Section 3501(c) applies to arrests by state officers only when they have a "working arrangement" with federal officers. The statute refers to arrest by "any" law enforcement officer or agency – without qualification. The purpose of Section 3501(c) is to limit incommunicado detention, and so all pre-arraignment custody should be included, especially when the only arraignment is in federal court.

While the legislative history is largely silent on this issue, the few comments which do exist suggest that Congress assumed state custody would be included. The *McNabb-Mallory* case law which existed at the time Section 3501(c) was enacted did not clearly establish a "working arrangement" requirement in cases where there was no state arraignment or sentence. Nothing suggests

that there was some unexpressed intent to limit the unqualified reference to "any" law enforcement officer or agency.

The court of appeals correctly suppressed Mr. Alvarez's confession under Section 3501(c). It did not base its decision on delay which took place after the confession but based its decision on (1) the fact that there was a delay specifically for interrogation and (2) the fact that this delay was in addition to an already lengthy delay. In any event, suppression under Section 3501(c) is mandatory; such was the original *McNabb-Mallory* rule, and Congress evidenced no intent to modify the rule beyond placing the six-hour time limitation on it.

II. Even if Section 3501(c) does not require suppression, the Court should affirm the decision below, because Mr. Alvarez's statement was made during a violation of his right to a prompt probable cause determination. The right to a prompt probable cause determination is a fourth amendment right to which the exclusionary rule must apply. If the exclusionary rule is not applied, officers will be tempted to delay and interrogate defendants before presentation of the case to a magistrate to avoid (1) the possibility of an adverse probable cause ruling and (2) "interference" arising from the appointment of counsel, setting of bail, and other procedural protections which many, if not most, jurisdictions provide in connection with a probable cause hearing. The exclusionary rule will deter misconduct by depriving officers of the fruits of the delay.

While the fourth amendment argument was not raised below, the Court should consider it, because there was a significant intervening change in the law. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991) created a presumption that delays in excess of 48 hours are unreasonable; this made litigation of the fourth amendment



issue feasible in a criminal case. Mr. Alvarez has consistently complained of the delay in some form, moreover; he simply based his initial challenge on Section 3501(c) rather than the fourth amendment.

While the state officers who arrested and held Mr. Alvarez claimed to have relied on a California statute, the good faith exception does not preclude application of the exclusionary rule. First, the officers did not comply with the requirements of the statute. Second, the good faith exception should not be extended to reliance on a permissive statute. Third, the officer's reliance here was not reasonable. A reasonable officer would have known there was a substantial risk that the statute was invalid, and the good faith exception should not apply in such circumstances.

## ARGUMENT

### I. MR. ALVAREZ'S CONFESSION WAS SUBJECT TO SUPPRESSION UNDER 18 U.S.C. § 3501(c).

#### A. Confessions Are Subject To Suppression Under Section 3501(c) Based On Delay In Arraignment Alone When The Delay Exceeds Six Hours And Is Not Otherwise Reasonable.

The court of appeals was correct in its conclusion that statements are subject to suppression under Section 3501(c) solely on the basis of delay when the delay exceeds six hours and is not otherwise reasonable. Both the language of the statute and its legislative history support this conclusion.

##### 1. The statutory language.

The plain language of Section 3501(c) indicates that Congress intended that provision to be a limit on the time during which law enforcement officers may interrogate a

suspect. Congress described the six-hour time period not as a "safe harbor" but as a "time limitation". 18 U.S.C. § 3501(c). "Limitation" is defined as "a restriction or restraint imposed from without", or "a time assigned for something." *Webster's Third New International Dictionary* 1312 (1986).

In addition, Section 3501(c) by its plain language determines when confessions will be "*inadmissible* solely because of delay" (emphasis added), not when delay will enter into the determination of voluntariness. This contrasts with the language of Section 3501(b), which governs the consideration of delay and other factors in "determining the issue of voluntariness". This focus on the effect of delay on *admissibility* instead of the consideration of delay "in determining the issue of voluntariness" is further evidence that Section 3501(c) was intended to establish a bright-line rule limiting interrogation.

The Government ignores this plain language and focuses solely on one sentence in Section 3501(a), providing that voluntary confessions "shall" be admissible. The Government then suggests that Section 3501(c) be interpreted as merely providing further guidance in the determination of voluntariness. This ignores the fact that Congress expressly provided much more detailed guidance in Section 3501(b). It is that section, which directly follows Section 3501(a), that explains how voluntariness should be determined.

Section 3501(c) has an altogether different function. Its focus is time. By its plain terms, it creates a "time limitation" on delay in arraignment, which affects whether confessions are "inadmissible". In contrast to Sections 3501(a) and 3501(b), which create a case-specific balancing test for voluntariness, Section 3501(c) creates a bright-line rule which limits pre-arraignment delay.



In recognition of this, most commentators interpret Section 3501(c) as requiring exclusion if delay exceeds six hours and is not otherwise reasonable. *See* 3 J. Wigmore, *Evidence* § 862a, at 623 (Chadbourn rev. 1970); 8 J. Moore, *Moore's Federal Practice* ¶ 5.02[2], at 5-13-15 (2d ed. 1992); *see also United States v. Perez*, 733 F.2d 1026, 1035 (2d Cir. 1984); *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970). Indeed, to construe Section 3501(c) otherwise would violate fundamental principles of statutory construction.

Initially, a contrary construction would violate the rule that statutes should be construed so as to give every word effect, *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992), and not to render any part inoperative or superfluous, *Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 250 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Broken down into its component parts, Section 3501(c) provides that a confession shall not be inadmissible solely because of delay if two conditions are satisfied: (1) The confession is voluntary; and (2) the confession was made within six hours of arrest (or such greater time as the court finds reasonable). If Section 3501(a) is construed to override Section 3501(c), the only requirement for admission of *any* confession is the requirement of voluntariness. The second condition set forth in Section 3501(c) – that the confession be made within the specified time period – is then rendered meaningless. To avoid this result, the plain language of Section 3501(c) must be read to establish an exception to Section 3501(a) when there is a delay in arraignment which exceeds six hours and is not otherwise reasonable.[1]

---

[1] The government's suggested reconciliation of Section 3501(a) and Section 3501(c), *see* Brief for the United States, at 33-34, unacceptably rewrites Section 3501(c). As the third step in

Such a construction is also mandated by the rule of statutory construction that a specific statute should control over a general one, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974), *quoted in Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The rationale for this rule is that it is in considering the specific statute that "the mind of the legislator has been turned to the details of the subject, and he has acted upon it." *Id.* (*quoting* T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)). This rationale is particularly pertinent in the case at bar, for the legislative history, *see*

---

its "regime", the government suggests that Section 3501(c) be construed to mean that "if the confession is given before presentment but within six hours of the arrest, the delay in presentment shall not be a basis for holding the confession inadmissible." *Id.* Since it is also the position of the government that confessions are inadmissible only if they are involuntary, this third step in the "regime" must mean that delay alone cannot be the basis for a finding of involuntariness if the delay is less than six hours.

Put in a logical construct, the government urges that Section 3501(c) be read as: *If* there is delay of six hours or less, *then* there are limits on the ways of finding voluntariness, to wit, such a finding cannot be based on delay alone. This reverses the plain language of Section 3501(c), which states that a confession given within six hours of arrest "shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily. . . . " Put in a logical construct, this means: *If* the confession is voluntary, *then* there is a limit on the consideration of delay, to wit, a confession may not be ruled inadmissible solely on the basis of delay which does not exceed six hours. The limit on consideration of delay comes into play *after* the determination of voluntariness, not before.

The government's "regime" rewrites the statute by making the voluntariness inquiry conditional on delay instead of the delay inquiry conditional on voluntariness. In essence the government is rewriting a statute to say "If B, then A" when it really says "If A, then B."



*infra* pp. 10-13, demonstrates that it was in debating Section 3501(c), not Section 3501(a), that "the mind of [the Senate] . . . turned to" the question of delay in arraignment.[2]

**2. The legislative history.**

The legislative history is even more compelling. The development of Section 3501(c) as it progressed through Congress demonstrates it was intended to be precisely what its plain language suggests – a "time limitation" directly affecting the "admissibility" of confessions, not just one more consideration "in determining the issue of voluntariness".

In the bill as initially reported out of the Senate Judiciary Committee, Section 3501(c) included no time limitation. The committee report which accompanied the bill evidenced a clear intent to flatly and completely repudiate the *McNabb-Mallory* rule. *See generally* S. Rep. No. 1097, 90th Cong., 2d Sess. 38-41 (1968) (hereinafter "Senate Report"). As the committee report recognized, the *McNabb-Mallory* rule made even voluntary confessions inadmissible if there was an unnecessary delay in arraignment. *See* Senate Report, *supra*, at 38.

The bill as reported was not agreeable to all, however. The title which contained Section 3501 "was

---

[2] The explanation of Section 3501(a) offered by the Judiciary Committee spokesman, Senator McClellan, when that section was considered separately with Section 3501(b) during a "division" of the bill, is enlightening. Senator McClellan stated that "this division has to do with the *Miranda* decision." 114 Cong. Rec. 14,171 (1968) (remarks of Sen. McClellan). Senator McClellan then apparently concurred with Senator Tydings' description of the second "division" – Section 3501(c) – as addressing "the *Mallory* decision". *Id.* at 14,172 (remarks of Sen. Tydings).

retained in the bill by the narrowest possible margin in the committee – an evenly divided vote of the full committee." *See* Senate Report, *supra* p. 9, at 147 (minority views of Messrs. Tydings *et al.*). Opponents on the Judiciary Committee "strongly opposed the committee action" and "urge[d] our colleagues in the Senate to delete title II from the bill when it is offered on the floor of the Senate." *Id.*

During debate, more specific concerns were expressed. Opponents complained that Section 3501(c) would "permit Federal criminal suspects to be questioned *indefinitely*," 114 Cong. Rec. 11,740 (1968) (remarks of Sen. Tydings) (emphasis added), and placed *"[n]o* limitations . . . upon the length of time which may be permitted to elapse between arrest and arraignment," *id.* at 14,135 (remarks of Sen. Brooke) (emphasis added).[3] The proponents countered with claims that the *Mallory* decision required almost immediate arraignment and was grossly inflexible.

> Since [*Mallory*], they have held that a person cannot be given even 5 minutes, that that is an unreasonable time. . . . If you have to run him straight to a magistrate, it is not even fair to the person arrested. With a little investigation, you might be able to find out that he is not guilty, and you can turn him loose.

114 Cong. Rec. 14,172-73 (remarks of Sen. McClellan).[4]

---

[3] *See also id.* at 14,174 (remarks of Sen. Cooper); *id.* at 14,137 (remarks of Sen. Fong); *id.* at 13,990 (remarks of Sen. Tydings); *id.* at 13,848 (remarks of Sen. McClellan); *id.* at 11,894 (remarks of Sen. Tydings); *id.* at 11,745 (remarks of Sen. Brooke).

[4] *See also* Senate Report, *supra* p. 9, at 38; 114 Cong. Rec. 14,132 (remarks of Sen. Bible) (*citing Alston v. United States*, 348 F.2d 72 (D.C. Cir. 1965) and describing it as case where "conviction of a self-confessed murderer whose guilt was not in dispute" was reversed "based on a 5-minute delay"); *id.* at 14,017 (remarks of Sen. Stennis) (describing *Mallory* as "inflexible rule" and noting "[t]he length of delay which invalidates a voluntary confession has been steadily reduced by the courts from 5 hours to 5 minutes"); *id.* at 11,612 (remarks of Sen. Thurmond); *id.* at 11,201-02 (remarks of Sen. McClellan).



Section 3501(c) as reported to the floor of the Senate was thus highly controversial. Yet, some senators recognized a middle ground, reflected in a District of Columbia statute which had been passed the previous year. Senator McIntyre noted:

> [I]n a number of cases in the District of Columbia the "unnecessary delay" criterion of the *Mallory* rule had been interpreted and applied to such an extent as to make it virtually impossible for investigating officers to speak with arrested persons with any assurance that resultant confessions would be acceptable in the courtroom. . . . In order to provide procedures which would at once permit reasonable police interrogation of suspects while fully protecting their constitutional rights, a 3-hour aggregate time period was recommended by the committee and eventually accepted by the Congress as the limit for questioning an arrested person during an investigation following arrest and prior to appearance of the accused before a magistrate. Thus law-enforcement officers and judges were provided a workable rule of thumb by which oppressive practices could be avoided, both as a matter of policy and within proper constitutional limits.

114 Cong. Rec. 14,168 (remarks of Sen. McIntyre).

Senator Scott thereafter offered an amendment to Section 3501(c) which added the six-hour time limit presently in the statute. *See* 114 Cong. Rec. 14,184-85 (1968). Both Senator Scott and the Judiciary Committee spokesman, Senator McClellan, acknowledged that the amendment would place limits on the period during which interrogation could take place. Senator Scott stated: "My amendment provides that the period during which confessions may be received or interrogations may continue, which may or may not result in a confession, shall in no case exceed 6 hours." *Id.* at 14,184.[5] Senator McClellan stated: "I do not want an unreasonable time, but I do want an opportunity for the law enforcement officers to perform their duty." *Id.* at 14,185. Neither Senator Scott nor Senator McClellan suggested that interrogation could continue beyond six hours so long as any confession which was obtained was voluntary. Their comments – taken alone, and read in the context of the concerns previously expressed by other Senators – indicate that the time limit was in addition to, and independent of, the general requirement of voluntariness.[6]

The government is thus incorrect in its assertion that "there is no indication that any Senator believed that [Senator Scott's amendment] would affect the voluntariness test set forth in Section 3501(a)," Brief for the United

---

[5] Senator Scott's initial amendment did not provide that a court could find a period greater than six hours to be reasonable. This qualification was proposed and approved at a later time. *See* 114 Cong. Rec. 14,787.

[6] When Senator Scott offered the amendment, Senator McClellan recognized the separate nature of the voluntariness inquiry. He pointed out: "If the judge finds [a confession] was not voluntary, no matter if [the suspect] was in custody for only 30 minutes, the confession should not be admitted." 114 Cong. Rec. 14,184 (remarks of Sen. McClellan).



States, at 28. Senator Scott and Senator McClellan spoke of the period during which interrogation was allowed and spoke of no allowance for additional interrogation so long as it produced confessions which were voluntary. Indeed, Senator Scott described his amendment as an attempt to conform Section 3501(c) to the District of Columbia law. *See* 114 Cong. Rec. 14,184 (remarks of Sen. Scott). That law – which was ordered printed in the record at the time Senator Scott's amendment was considered – made no reference whatsoever to voluntariness. *See* Act of Dec. 27, 1967, P. Law 90-226, § 301(b), 81 Stat. 734, 735-36 (1967) ("[a]ny statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence . . . solely because of delay in presentment"), *quoted in* 114 Cong. Rec. 14,185.

The ensuing debate in the House of Representatives does not suggest a different meaning. While it is true that some members of the House spoke generally of Section 3501(c) as overruling *Mallory*, *see* Brief for the United States, at 29 & n. 10, most recognized this was limited by Senator Scott's amendment. For example, Representative Anderson explained: "Section 3501(c) does overrule the *Mallory* decision. . . . *Specifically, a 6-hour delay before the suspect is brought before a committing magistrate would be permitted.*" 114 Cong. Rec. 16,276 (remarks of Rep. Anderson) (emphasis added).[7] Senator Scott's and Senator McClellan's remarks are entitled to the greatest weight,

---

[7] *See also id.* at 16,273 (remarks of Rep. Rogers) (bill "modifies" *Mallory* rule; also noting six-hour time limit); *id.* at 16,068 (analysis of Rep. Celler) (describing Section 3501(c) as "obviously intended to repeal" *Mallory*, but also describing it as "expand[ing] the time limit to six hours during which interrogation may take place"); *id.* at 16,297-98 (remarks of Rep. Pollock); *id.* at 16,286 (remarks of Rep. Udall).

moreover, because of their more intimate involvement with the legislation as author and committee spokesman. *See Federal Energy Admin. v Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976).[8] *See also Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (legislative history in body where provision originated more persuasive).

In sum, while some senators wanted to eliminate the *McNabb-Mallory* rule completely, they lost this legislative battle and had to compromise. Section 3501(c) retained a limited form of the rule which applied once six hours, or such longer period as a court might find reasonable, had passed. Nothing in the legislative history suggests that

---

[8] This is especially true in the case of 18 U.S.C. § 3501. The bill of which it was a part was rushed through the House of Representatives in just two days, immediately after Senator Robert F. Kennedy had been assassinated. *See* 114 Cong. Rec. 16,293 (remarks of Rep. Fraser); *id.* at 16,288 (remarks of Rep. McClory); *id.* at 16,287 (remarks of Rep. Patten); *id.* (remarks of Rep. Dow); *id.* at 16,282 (remarks of Rep. Conte); *id.* at 16,281 (remarks of Rep. Blanton); *id.* at 16,076 (remarks of Rep. Harsha); *id.* at 16,073 (remarks of Rep. Mathias); *id.* (remarks of Rep. MacGregor); *id.* at 16,072 (remarks of Rep. Cahill); *id.* at 16,070 (remarks of Rep. Anderson). A number of congressmen complained that this prevented careful consideration of the bill. *See id.* at 16,298-99 (remarks of Rep. Colmer); *id.* at 16,294 (remarks of Rep. Ryan); *id.* at 16,288 (remarks of Rep. Schwengel); *id.* at 16,283 (remarks of Rep. Kastenmeier); *id.* at 16,076 (remarks of Rep. Derwinski). Indeed, some opined that most congressmen had not even fully read the bill. *See id.* at 16,299 (remarks of Rep. Colmer); *id.* at 16,066 (remarks of Rep. Celler). Representative Machen, one of the congressmen whose remarks are cited by the government, *see* Brief for the United States, at 29 n. 10, thought the bill still contained provisions restricting review of state court rulings, *see* 114 Cong. Rec. 16,285 (remarks of Rep. Machen), when those provisions had in fact been deleted by the Senate, *see id.* at 14,183-84; *id.* at 14,177.



the rule was also modified to require an additional finding of involuntariness, and, in fact, the comments of key senators indicate precisely the opposite.

### B. The Arrest By State Officers Was An "Arrest Or Other Detention In The Custody Of Any Law-Enforcement Officer Or Law-Enforcement Agency" Within The Meaning Of Section 3501(c).

The government contends that Section 3501(c) applies to arrests by state officers only when they have a "working arrangement" with federal officers. This interpretation of Section 3501(c) is incorrect; it is not supported by either the statutory language, the statute's purpose, or its legislative history. The interpretation most consistent with the statutory language, purpose, and history is that Section 3501(c) applies to any arrest, whether by state or federal officers, especially when, as here, it is followed by a federal instead of a state arraignment.

#### 1. The statutory language.

Initially, the plain language of the statute requires such a construction. In its effort to draw meaning from "the context" of Section 3501(c), the Government wholly fails to address the plain language of the statute. A careful reading of Section 3501(c) leads inescapably to the conclusion that it applies to individuals arrested by state authorities to the same extent as individuals arrested by federal authorities.

Section 3501(c) provides, in pertinent part:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-

> enforcement officer or law-enforcement agency, shall not be inadmissible solely because of the delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia. . . .

First, the provision applies to persons "under arrest *or other detention*." (Emphasis added.) The use of the phrase "or other detention" evidences a congressional intent to take a broad view of the event triggering application of the statute.

Second, and even more importantly, the statute applies to persons "in the custody of *any* law enforcement officer or law enforcement agency." (Emphasis added.) "Any" is a broadly inclusive word meaning "one or some of whatever kind" and used "to indicate one that is not a particular or definite individual of the given category but whichever one chance may select." *Webster's Third New International Dictionary* 97 (1986). This Court has repeatedly recognized that use of the word "any" indicates a broad, inclusive intent. *See, e.g., United States v. James*, 478 U.S. 597, 605 (1986); *Pfizer, Inc. v. India*, 434 U.S. 308, 312 (1978); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

This unqualified language contrasts with the prior reference in Section 3501(c) to criminal prosecution "by the United States or by the District of Columbia." It also contrasts with the later reference to judicial officers "empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia." The fact that Congress specifically qualified these other references, but did not qualify the reference to law enforcement officers, establishes an intent not to limit



the latter reference. *See Russello v. United States*, 464 U.S. 16, 23 (1983).[9]

Given the plain meaning of the word "any", there is no need to look to "context", as the government suggests, *see* Brief for the United States, at 14. Even was the Court to do so, however, context is helpful only to the extent that "all but one . . . meaning[ ] is . . . eliminated . . . ," *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993), and here that is not the case.

In fact, the best "in context" reading of "arrest or other detention" is that it must include at a minimum any arrest which is followed by the filing of federal, rather than state, charges. Such a construction is essential if the statute is to function properly, for state officers can and often do make arrests for federal offenses. *See* 18 U.S.C. § 3041; Fed. R. Crim. Pro. 4(d)(1). *See also United States v. Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977). Under the government's construction, Section 3501(c) would be

---

[9] With one exception, *see United States v. Van Lufkins*, 676 F.2d 1189, 1192-93 (8th Cir. 1982), none of the court of appeals cases cited by the government, *see* Brief for the United States, at 31 & n.11, consider this statutory language. *See United States v. White*, 979 F.2d 539, 543 (7th Cir. 1992); *United States v. Carter*, 910 F.2d 1524, 1528 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1628 (1991); *United States v. Barlow*, 693 F.2d 954, 957-59 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v. Torres*, 663 F.2d 1019, 1023-24 (10th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982); *United States v. Watson*, 591 F.2d 1058, 1061-62 (5th Cir.) (*per curiam*), *cert. denied*, 441 U.S. 965 (1979); *United States v. Jensen*, 561 F.2d 1297, 1299 (8th Cir. 1977); *United States v. Gaines*, 555 F.2d 618, 622 (7th Cir. 1977); *United States v. Rollerson*, 491 F.2d 1209, 1212 (5th Cir. 1974); *United States v. Elliott*, 435 F.2d 1013, 1015 (8th Cir. 1970). Given their failure to consider this most basic starting point for statutory construction, these cases should be given no weight.

totally inapplicable when a state officer arrests a defendant and exercises control over him until or almost until the defendant is actually presented to a federal magistrate. Where a state officer believes from the time of arrest that a federal crime has been committed and the defendant is arraigned only on federal charges, Section 3501(c) must apply.

Indeed, that is precisely the factual scenario presented here. This is not a case in which state officers were simply "enforcing their own laws", Brief for the United States, at 14, and the Court need not necessarily decide the applicability of Section 3501(c) in that situation. While the state officers may have had some concern for the enforcement of state law, they knew of the federal offense from the beginning and showed deference to federal interests. They notified the Secret Service about the counterfeit currency pursuant to an official policy, waited for an agent to come interview Mr. Alvarez, and then surrendered Mr. Alvarez to the Secret Service when it decided to pursue charges. The more narrow question presented by this case is whether Section 3501(c) applies to an arrest by state officers which is followed by a federal arraignment on federal charges, and no state arraignment.

Applying Section 3501(c) to state arrests followed by federal arraignment will further the purpose of the statute and not unduly constrain law enforcement. The purpose of Section 3501(c) is not, as the government appears to assume, *see* Brief for the United States, at 17, to deter federal officers from violating prompt arraignment rules. Congress in enacting Section 3501(c) chose to retain a limited form of the *McNabb-Mallory* rule. *See supra* pp. 12-15. That rule is a prophylactic rule designed to "check[ ] resort to those reprehensible practices known as the 'third degree' " and "aims to avoid all the evil implications of secret interrogation of persons accused of crime."



*Mallory v. United States*, 354 U.S. 449, 452-53 (1957) (*quoting McNabb v. United States*, 318 U.S. 332, 344 (1943)). It simply accomplishes this as a bright-line rule rather than through fact-specific inquiries into voluntariness. *Cf. Withrow v. Williams*, 113 S. Ct. 1745, 1753 (1993) (prophylactic *Miranda* safeguards intended to protect privilege against self-incrimination, not deter unlawful police conduct).

This purpose is most effectively advanced by a rule that focuses on the total time a defendant has been in custody without an arraignment.[10] Time in custody is time in custody, regardless of who the custodial official is.

If a defendant has already been in state custody for a lengthy period, federal officers simply have an incentive to present the defendant more promptly, without further delay for interrogation. The rule adopted by the court of appeals does not "effectively require[ ] federal authorities to make an arrest and to file charges before they can interview a suspect," Brief for the United States, at 17. Federal authorities are perfectly able to delay their interview of a suspect until either the *status quo* is restored by his release or he is arraigned in state court on state charges.

What the government is really complaining of is that it may be denied the opportunity to vicariously benefit from state custodial status without being held responsible for it. To exclude time in state custody from consideration under Section 3501(c) would create an opportunity for

---

[10] Contrary to the suggestion of the government, *see* Brief for the United States, at 19 n. 3, Mr. Alvarez's position in the present case was not identical to that of the defendant in *United States v. Carignan*, 342 U.S. 36 (1951). In *Carignan*, the defendant had already been arraigned on another federal charge. *See id.* at 43-44. The purpose of preventing excessive incommunicado detention was therefore not implicated.

manipulation by federal officers, who could simply decline to take custody unless and until they had interrogated the suspect.[11]

**2. The legislative history.**

The legislative history of Section 3501(c) does not support the government's position, either. The government's lengthy discussion of legislative history includes not a single comment addressing the treatment of state custody preceding a federal arraignment. The government cites only the legislative history which it claims demonstrates an intent to completely overrule the *Mallory* decision. From this premise, the government concludes Congress must have intended to act unfavorably as to

---

[11] The Speedy Trial Act cases cited by the government are inapposite. Initially, the language in the Speedy Trial Act differs – it expressly refers to an arrest or summons "in connection with [the] charges" contained in the indictment or information. 18 U.S.C. § 3161(b); *see United States v. Mills*, 964 F.2d 1186, 1188-89 (D.C. Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 471 (1992). Secondly, the Speedy Trial Act is focused on a concern about charges "hanging over a person's head unresolved," *United States v. Janik*, 723 F.2d 537, 542 (7th Cir. 1983), and constitutional and policy concerns about dual prosecution, *see United States v. Iaquinta*, 674 F.2d 260, 264-68 (4th Cir. 1982) *and cases cited therein*, not the effect of excessive incommunicado detention. Finally, a narrower rule is justified because the sanction for a Speedy Trial Act violation – dismissal – is more severe than mere suppression of statements. *Cf. United States v. Crews*, 445 U.S. 463, 478 (1980) (White, J., concurring in result) (rejecting application of exclusionary rule where it "would be tantamount to holding that an illegal arrest effectively insulates one from conviction"). *See also United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2192-93 (1992); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886).



defendants in any and all respects. This argument must fail – for three reasons.

First, the government's premise is erroneous. As discussed *supra* pp. 11-15, Section 3501(c) as finally passed by Congress was not a complete repudiation of the *McNabb-Mallory* rule. Congress retained a limited form of the rule as a compromise.

Second, the government's logic is questionable as a principle of statutory construction. The Court should not construe a statute as "anti-defendant" in all respects based on a general conclusion that Congress was in an "anti-defendant" mood when it considered and passed the statute. No case adopts such an imperfect and undiscriminating principle of statutory construction.

Third, the *McNabb-Mallory* case law which predated Section 3501(c) did *not* clearly require a "working arrangement" between state and federal authorities in cases where a defendant was not initially arraigned on state charges. Neither *Anderson v. United States*, 318 U.S. 350 (1943) nor *United States v. Coppola*, 281 F.2d 340 (2d Cir. 1960) (*en banc*), *aff'd*, 365 U.S. 762 (1961) (*per curiam*) established this.

Initially, *Anderson* did not do so. While the Court in *Anderson* did note the existence of a "working arrangement" in that case, it did not hold that this was *required*. *See id*. at 356. The Court simply noted this as one fact in support of its holding.

*Coppola* is factually distinguishable. The defendant in *Coppola* was not only arrested by state officers, but was arraigned in state court, on state charges, which the state intended to pursue. *See Coppola*, 365 U.S. at 764 (Douglas, J., dissenting); *Coppola*, 281 F.2d at 342. The government in *Coppola* emphasized this as a critical factor. *See* Brief in Opposition, at 17, *Coppola v. United States*, No. 153 (O.T. 1960); Brief for the United States, at 35-36, 67, *Coppola v.*

*United States*, No. 153 (O.T. 1960). Many of the courts citing *Coppola* also emphasized this factor. *See Barnett v. United States*, 384 F.2d 848, 858 (5th Cir. 1967) (important "whether or not state officials will proceed with further action on the state charge independent of the federal investigation"); *Jones v. United States*, 342 F.2d 863, 865 n.2 (D.C. Cir. 1964) (*en banc*) (distinguishing *Coppola* on ground that there "the apprehension and detention were exclusively for state crimes"); *Burke v. United States*, 328 F.2d 399, 404 (1st Cir. 1964) (Aldrich, J., dissenting) (distinguishing *Coppola* as a case "where the defendant was held on bona fide state charges"); *Hollingsworth v. United States*, 321 F.2d 342, 350 (10th Cir. 1963) (noting local officers "were concerned *only with state offenses* and were not acting for or in behalf of federal officers, pursuant to any working arrangement *or otherwise*" (emphasis added)). In most of the cases which cited *Coppola* prior to enactment of Section 3501(c), there had been a state arraignment or sentence. *See, e.g., United States v. Hindmarsh*, 389 F.2d 137, 141, 146 (6th Cir. 1968); *United States v. Ardner*, 364 F.2d 719, 720 (4th Cir. 1966); *United States v. Thompson*, 356 F.2d 216, 219, 225 (2d Cir. 1965); *United States v. Gorman*, 355 F.2d 151, 156 (2d Cir. 1965); *Cram v. United States*, 316 F.2d 542, 543, 544-45 (10th Cir. 1963). That is not the situation presented here, where there was no state arraignment and the state officers clearly gave the federal charges priority.

Regardless of what the rule was under *McNabb-Mallory*, moreover, Section 3501(c) is the law now, and it refers without qualification to "arrest or other detention" by "any" law enforcement officer or agency. The *McNabb-Mallory* case law is relevant only to the extent that Congress focused on it in drafting and amending Section 3501(c). Nothing in the legislative history suggests either that Congress focused on the "working



arrangement" cases or that it decided on its own to adopt such a requirement. Indeed, those bits of legislative history which do exist suggest that Congress assumed that arrests by state officers would be generally included. *See* 114 Cong. Rec. 14,185 (1968) (remarks of Sen. Allott) (describing scenario where "in one of the outlying towns, . . . the *sheriff* picks up a man under the Dyer Act . . . on transporting a stolen vehicle across a State line illegally" (emphasis added)); *id.* at 14,184 (remarks of Sen. McClellan) ("I can appreciate that an officer might pick a suspect up at 12 o'clock at night, and need to check with officers in another *State*" (emphasis added)).

The development of Section 3501(c) in the legislative process is significant. The Senate Judiciary Committee initially reported a bill which would have overruled *McNabb-Mallory* wholesale. Other senators strenuously objected during the subsequent debate. Then a compromise was reached, whereby a limited form of the *McNabb-Mallory* rule was preserved.

Given the initial focus of the bill on overruling *McNabb-Mallory* wholesale, there would have been no need to draw a distinction between arrests by state officers and arrests by federal officers. Indeed, the broad references to "any" law enforcement officer or agency and "arrest or other detention" – which were both in the original version of Section 3501(c) – sweep quite broadly. While Congress could have narrowed this language once it added a *McNabb-Mallory* time limitation, it did not do so, and it thereby kept the original meaning.

At best for the government, the legislative history suggests that Congress did not consider a distinction between state and federal officers one way or the other. At worst, it suggests that Congress assumed an arrest by state officers was included.

### C. The Court Of Appeals Correctly Ruled That Mr. Alvarez's Confession Should Be Suppressed.

There remains only to consider whether or not the court of appeals properly applied Section 3501(c) in the present case. The government, citing *United States v. Mitchell*, 322 U.S. 65 (1944), suggests the court of appeals did not apply the rule correctly because it based its ruling on delay which took place after Mr. Alvarez's confession. *See* Brief for the United States, at 36-38.

In advancing this argument, the government misreads the court of appeals' opinion. Mr. Alvarez did make his statement late Monday morning and the court of appeals did note that Mr. Alvarez's arraignment "was delayed from Monday afternoon to Tuesday morning". Pet. App. 21a. Yet, the court described the delay that violated Section 3501(c) as the one intended "specifically to provide federal officers with time to interrogate him". *Id.* It was thus the delay for the purpose of interrogation which the court found improper; its reference to the delay from Monday afternoon to Tuesday morning was simply a description of one effect of the delay for interrogation.

The government also misconstrues the court of appeals' opinion if it intends to suggest it was *only* the delay for interrogation that concerned the court of appeals. The court based its decision on the fact that the delay for interrogation was on top of the over 2½ day delay which had already taken place. *See* Pet. App. 22a ("the avoidable and deliberate delay engaged in here, *after a long period of custody*, for the sole purpose of interrogating the arrestee requires suppression of the confession" (emphasis added)). The additional delay for



interrogation was simply the straw that broke the camel's back.[12]

---

[12] The government's passing suggestion that Mr. Alvarez's waiver of his *Miranda* rights bars any claim under Section 3501(c), *see* Brief for United States, at 35 n. 12, also lacks merit. The cases cited by the government stand only for the proposition that a brief delay to obtain a waiver of *Miranda* rights and conduct a subsequent interrogation is permissible. *See Pettyjohn v. United States*, 419 F.2d 651, 656 (D.C. Cir. 1969) (person who voluntarily makes statement cannot "then claim . . . that the . . . period during which they spoke constituted a prejudicial delay in violation of his right to rapid arraignment"), *cert. denied*, 397 U.S. 1058 (1970). *See also Frazier v. United States*, 419 F.2d 1161, 1166 n. 25 (D.C. Cir. 1969) (construing *Mallory* not to require exclusion of otherwise admissible confession solely because of brief delay in obtaining *Miranda* waiver). The cases which have followed *Pettyjohn* have generally involved delays which would have been found to be reasonable in any event. *See, e.g., United States v. Barlow*, 693 F.2d 954, 959 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v. Indian Boy X*, 565 F.2d 585, 587-89 (9th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978); *O'Neal v. United States*, 411 F.2d 131, 136 (5th Cir.), *cert. denied*, 396 U.S. 827 (1969). The rule suggested by these cases does not apply to more extended delays. *See United States v. Keeble*, 459 F.2d 757 (8th Cir. 1972) (distinguishing *Frazier*, *O'Neal*, and *Pettyjohn* as involving "a short interval between the arrest and the statement" and holding *Miranda* warnings did not cure 99-hour delay in case at bar), *rev'd on other grounds*, 412 U.S. 205 (1973); *Frazier*, 419 F.2d at 1166 n. 25 ("[w]e do not conclude, however, that in waiving his right to remain silent, the accused also impliedly waives his right to complain of a *prior* violation of Rule 5(a)" (emphasis in original)).

Were such a limitation not recognized, the other purposes of Section 3501(c) would be undercut. A prompt arraignment

This ruling seems eminently reasonable when one examines the facts of the instant case. Counterfeit bills were found at the time of Mr. Alvarez's arrest. Local authorities were thus immediately aware that a federal prosecution was possible, and the detective in charge of the investigation indicated that he intended to present the case to the district attorney only if the Secret Service decided not to prosecute. Pet. App. 57a, 59a. When state officers give federal prosecutorial interests priority in this fashion, they should not take no action at all for 2½ days.

Regardless of how the court of appeals' opinion is read, moreover, Section 3501(c) required exclusion. While the court of appeals did not reach the issue and the government ignores it, exclusion is mandatory, not discretionary, when there is non-compliance with the time limitation in Section 3501(c).

This was the rule under the old *McNabb-Mallory* case law. *See Mallory v. United States*, 354 U.S. at 453 (describing rule as "render[ing] inadmissible incriminating statements"); *United States v. Carignan*, 342 U.S. 36, 41 (1951) (describing rule as requiring that confession "shall be excluded" if obtained during unlawful detention);

---

assures not only that the defendant receives a prompt judicial advisement of his rights but also the appointment of counsel, an opportunity for the defendant to request bail, and a judicial review of the existence of probable cause, *see United States v. Salamanca*, 990 F.2d 629, 634 (D.C. Cir. 1993) ("[o]ne of the primary rationales for a prompt appearance before a magistrate is to resolve the issue of probable cause"). The right to request bail and the right to a judicial review of probable cause are not addressed at all in the *Miranda* warnings.



*Upshaw v. United States*, 335 U.S. 410, 414 (1948) (confessions "are inadmissible"). As noted *supra* p. 12, Section 3501(c) was amended to retain the *McNabb-Mallory* rule for delays in excess of six hours which were not otherwise reasonable. Senator Scott and Senator McClellan, in speaking of the amendment which added the limited *McNabb-Mallory* rule, spoke generally of how long interrogations could continue. *See* 114 Cong. Rec. 14,184 (1968) (remarks of Sen. Scott), *quoted supra* p. 12; *id.* at 14,185 (remarks of Sen. McClellan), *quoted supra* p. 12. Nowhere did any senator suggest that, in addition to limiting the rule to delays in excess of six hours, Congress also intended to modify the rule by making exclusion discretionary. The legislative history instead suggests that Congress intended to retain the *McNabb-Mallory* rule in its original form – with the one important caveat that it could not be applied at all to delays of six hours or less.

## II. THE COURT OF APPEALS' RULING SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT MR. ALVAREZ'S STATEMENT WAS MADE DURING A VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that the fourth amendment requires a prompt judicial determination of probable cause when there is extended pretrial detention after a warrantless arrest. *See id.* at 126. In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the Court held that a delay which exceeds 48 hours is presumptively unreasonable and is permissible only if there exists a "bona fide emergency or other extraordinary circumstance". *Id.* at 1670.

In the present case, there was a clear violation of this constitutional requirement by the time the Secret Service

agent interviewed Mr. Alvarez. Mr. Alvarez had been held in custody for over 2½ days, and there was no "bona fide emergency or other extraordinary circumstance". The local police detective who made the arrest indicated that there was no reason for the detention other than his belief that the law permitted him to take his time. *See* Pet. App. 57a. At the time Agent Lipscomb interviewed Mr. Alvarez, therefore, the detention was in violation of *Gerstein* and *McLaughlin*.

### A. The Exclusionary Rule Applies To Statements Made During A Violation Of The Right To A Prompt Probable Cause Determination.

Because both *Gerstein* and *McLaughlin* were civil class actions, the Court did not address the question of when and how the exclusionary rule applies. The right to a prompt probable cause determination is a fourth amendment right, however. *Gerstein*, 420 U.S. at 114. And the general rule is that evidence obtained through a violation of the fourth amendment is subject to exclusion in order to discourage the unlawful conduct. *James v. Illinois*, 493 U.S. 307, 311 (1990); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

In deciding whether to recognize an exception to this general rule, the Court "has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). While these costs are undesirable, they are an inevitable side effect of the protection of constitutional rights. *See Arizona v. Hicks*, 480 U.S. 321, 329 (1987) ("there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all").



The exclusionary rule will have a significant deterrent effect on police disrespect for the basic fourth amendment right recognized in *Gerstein* and *McLaughlin*. If the exclusionary rule is not applied, the police will have no incentive to comply with *Gerstein* and *McLaughlin*, for they will risk no loss of evidence and no other sanction of note.[13] There will be an incentive to comply, on the other hand, if the rule is applied.

An argument might be made that the exclusion of a confession obtained during a *Gerstein-McLaughlin* violation is unnecessary to protect fourth amendment interests because: (1) The confession will be excludable as a fruit of the illegal arrest if there was no probable cause; and (2) a magistrate would have approved the detention in any event if there was probable cause. Relying upon this as a rationale for not applying the exclusionary rule would prove too much, however. An analogous claim that officers could have obtained a search warrant could be made in many, if not most, warrantless search cases. Yet, this argument against application of the exclusionary rule in the search warrant context has been expressly rejected. *See United States v. Chadwick*, 433 U.S. 1, 15-16 (1977), *overruled on other grounds, California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) (*citing United States v. Johnson*, 333 U.S. 10 (1948) and *Chapman v. United States*, 365 U.S. 610 (1961)).[14]

---

[13] Class action lawsuits such as those in *Gerstein* and *McLaughlin* can only be relied upon to remedy broad systemic violations, not individual violations which continue after systemic corrections have been made. Individual civil rights actions, while feasible in some isolated cases, are no more feasible than in cases where a defendant is arrested without probable cause.

[14] It also cannot necessarily be assumed that because a court subsequently finds probable cause for the arrest at a

The need to apply the exclusionary rule to enforce *Gerstein* and *McLaughlin* is highlighted by a comparison with this Court's application of the rule to illegal warrantless arrests in the home. The Court considered that problem in *New York v. Harris*, 495 U.S. 14 (1990). The Court noted that evidence found and statements taken in the home at the time of the unlawful entry would be subject to suppression but held that statements made outside the home would not be. *See id.* at 20-21.

The Court based its holding in *Harris* in part on a conclusion that once the defendant had been removed from the home, he was "in legal custody" and thus not entitled to release. *See id.* at 18, 20. A defendant who is held beyond the time allowed for a prompt judicial determination of probable cause, in contrast, *is* entitled to release. *See Gerstein*, 420 U.S. at 114 (judicial determination of probable cause a "prerequisite" to extended detention). *See also Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969) (habeas corpus petitioner ordered released after being held for more than 16 days without probable cause hearing), *cited with approval in Gerstein*, 420 U.S. at 119. Such a defendant is not "in legal custody." Statements made during this period should be subject to suppression just as any statements made in the home during a warrantless arrest are subject to suppression under *Harris*.

---

suppression hearing, a magistrate conducting a *Gerstein* review would also have found probable cause. As this Court has noted, "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *United States v. Leon*, 468 U.S. 897, 914 (1984). *See also United States v. Ventresca*, 380 U.S. at 109. Great deference is given to a magistrate's finding, so long as there is a substantial basis for it. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983).



An analysis of the incentives considered in *Harris* also supports this conclusion. The Court in *Harris* weighed the incentives as follows:

> Even though we decline to suppress statements made outside the home following a *Payton [v. New York*, 445 U.S. 573 (1980)] violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home. If we did suppress statements like Harris', moreover, the incremental deterrent value would be minimal. Given that the police have probable cause to arrest a suspect in Harris' position, they need not violate *Payton* in order to interrogate the suspect. It is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*.

*Harris*, 495 U.S. at 20-21.

In the *Gerstein-McLaughlin* context, the incentives are different. If statements and other evidence discovered during the violation itself are not suppressed, nothing will be. This will leave no incentive whatsoever to comply with *Gerstein* and *McLaughlin*.

Police officers will have an affirmative incentive not to comply, moreover. An officer who, before presenting the defendant to the magistrate, can obtain a confession which indisputably establishes probable cause will not have to worry about being ordered to release the defendant. Further, though *Gerstein* does not require it, many, if not most, jurisdictions combine the required judicial determination of probable cause with the appointment of counsel, a personal appearance before a judicial officer who advises the defendant of his rights, and/or a bail hearing. *See McLaughlin*, 111 S. Ct. at 1668, 1671; *Gerstein*, 420 U.S. at 119-25. A police officer in a jurisdiction such

as this will know that a defendant may be significantly less likely to waive his rights and submit to interrogation afterwards.

A comparison with *Murray v. United States*, 487 U.S. 533 (1988), also illustrates the need to apply the exclusionary rule to evidence obtained during a *Gerstein-McLaughlin* violation. In *Murray*, law enforcement officers had unlawfully entered a warehouse and seen marijuana but refrained from seizing it until they had obtained a search warrant. *See id.* at 535-36. The Court held that the "independent source" exception to the fruit of the poisonous tree doctrine would apply if the government could establish that the officers would have gotten a search warrant anyway. *See id.* at 542. As in *Harris*, the Court focused on the incentives for the typical law enforcement officer.

> An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. . . . Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate. (Footnote omitted.)

*Id.* at 540 (emphasis in original).



Again, the incentives differ in the present context. The other rights which most jurisdictions provide in conjunction with a judicial determination of probable cause may make it much more difficult for officers to obtain a confession. This gives officers a significant incentive to delay.

On the other hand, the Court's reasoning in *Murray* that an officer without sufficient probable cause will have no incentive to make an unlawful entry is inapplicable. This reasoning assumes an officer who will understand and comply with fourth amendment limitations. In the *Gerstein-McLaughlin* context, the officer has already made an arrest, and, if he made that arrest without probable cause, he has already made either a careless mistake or a knowing one about which he has no qualms. Such an officer is the most likely to seek a confession to strengthen his case and then hope that the lack of probable cause for the original arrest will not surface – because, for example, the defendant elects to plead guilty.

In the case of a defendant's statements, moreover, there is not the troublesome metaphysical question of the "reseizure of tangible evidence already seized". *See Murray*, 487 U.S. at 541-42. A second statement can always be sought through reinterrogation after a judicial determination of probable cause. *Cf. Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (second statement obtained after valid waiver of *Miranda* rights not necessarily tainted by prior statement obtained without valid waiver). The first and second statements are clearly identifiable and separable.

Of course, application of the exclusionary rule is limited by the requirement that the causal connection between the illegality and the evidence in question not be overly attenuated. The standard to be applied when there is an arrest that is not initially supported by probable cause was enunciated in *Brown v. Illinois*, 422 U.S. 590

(1975). It focuses on three factors: The temporal proximity of the detention and the statement; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

This standard is inapt in the context of a *Gerstein-McLaughlin* violation, however. In that context, the temporal proximity is immediate, because a *Gerstein* violation is a continuing violation of the defendant's rights; indeed, the passage of time actually aggravates the violation. *Accord* Thomas, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U.L. Rev. 413, 458-59 (1986). The continuing nature of the violation also means that there can be no intervening circumstance, for there is no period between the violation and the statement during which a circumstance can intervene. *Id.* at 459; *compare Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (initial appearance before magistrate purged taint of illegal arrest); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (release of defendant on own recognizance purged taint of illegal arrest). A waiver of *Miranda* rights is not a sufficient intervening circumstance; rather, it is "merely a 'threshold requirement' for Fourth Amendment analysis." *Dunaway v. New York*, 442 U.S. 200, 217 (1980) (*quoting Brown*, 422 U.S. at 604).

The more appropriate test to apply in the context of a *Gerstein-McLaughlin* violation is a bright-line test analogous to the one implicitly recognized in *New York v. Harris*, *supra*. As noted *supra* p. 30, the Court in *Harris* drew a simple distinction between statements obtained during the constitutional violation and those obtained after it had ended. By analogy, the exclusionary rule should apply in the *Gerstein-McLaughlin* context to all statements made during the excessive delay and should apply to no statements made afterward, regardless of



whether a defendant might show insufficient attenuation under *Brown*.[15]

In sum, application of the exclusionary rule to statements obtained during a *Gerstein-McLaughlin* violation is critical to enforcement of the fourth amendment right recognized in those cases. Without such an exclusionary rule, officers will have absolutely no incentive to comply with *Gerstein* and *McLaughlin*. With such a rule, there will be a significant deterrent effect. Officers will realize that if they promptly present the case to a judicial officer and then interrogate the defendant, his statements will be admissible; correspondingly, statements will not be admissible if the officers interrogate the defendant while delaying the probable cause determination.[16]

---

[15] Were the *Brown* test applied, suppression would still be required in the present case. As noted *supra*, the temporal proximity of a *Gerstein-McLaughlin* violation is immediate and there can be no intervening circumstance. When this is the case, it is questionable whether the purpose of the officers should enter into the calculus at all. *See United States v. Johnson*, 626 F.2d 753, 758-59 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982). Even if it does, the arresting officers' purpose and conduct here can hardly be viewed as laudable. They held Mr. Alvarez for over 2½ days, apparently just because it was inconvenient to contact the Secret Service over the weekend. They then delayed Monday morning for the specific purpose of letting the Secret Service conduct a custodial interrogation before Mr. Alvarez could go to court. Even if there might be some claim of "good faith", the Court has expressly rejected that as a basis for finding attenuation under *Brown*. *See Taylor v. Alabama*, 457 U.S. 687, 693 (1982). Any such claim must be analyzed under this Court's "good faith exception" case law. *See infra* pp. 39-49.

[16] Mr. Alvarez's waiver of *Miranda* rights does not bar this claim, moreover. In *Brown v. Illinois*, 422 U.S. 590 (1975), the Court flatly rejected the argument that a waiver of *Miranda* rights also constituted a waiver of fourth amendment rights. *See id.* at 601. The Court pointed out:

**B. This Court Should Consider The McLaughlin Issue Even Though The Issue Was Not Raised Below.**

It is well established that a respondent can defend the judgment below on any ground without the need for a cross-petition for writ of certiorari. *See Reno v. Flores*, 113 S. Ct. 1439, 1446 n.3 (1993); *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). In general, however, the issue must be one which was "properly raised below". *Reno v. Flores*, 113 S. Ct. at 1446 n.3. Mr. Alvarez did not raise a *McLaughlin* claim in either the district court or the court of appeals.

There are exceptions to the general rule that the Court will consider an issue only if it was raised below, however. *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Hormel v. Helvering*, 312 U.S. 552, 557-59 (1941). One of the most fundamental of these exceptions is for cases "in which there have been judicial interpretations of existing law after decision below and pending appeal – interpretations which if applied might have materially altered the result. (Footnote omitted.)" *Id.* at 558-59.

*McLaughlin* – which was issued after briefing and argument in the court of appeals in the present case – was

---

> Arrests made without warrant or without probable cause, for questioning or "investigation" would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. (Footnote omitted.) Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all,". . . .

*Id.* at 602-03.

The same is true in the case of a *Gerstein-McLaughlin* violation.



such an interpretation of existing law. While there were prior lower court decisions construing *Gerstein* to place limits on detention prior to a judicial determination of probable cause, those decisions took a very different approach than that taken in *McLaughlin*.

In particular, the prior case law did not recognize a presumptive time limit on the period of detention, but took a case-by-case approach. The courts focused on the circumstances of the particular jurisdiction in question, including geography, available resources, caseloads, and other broad systemic conditions. *See, e.g., Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988); *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1024-25 (9th Cir. 1983); *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1140 (4th Cir. 1982); *Sanders v. City of Houston*, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984); *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978). *See generally* Brandes, *Post-Arrest Detention and the Fourth Amendment: Redefining the Standard of Gerstein v. Pugh*, 22 Col. J.L. & Soc. Prob. 445, 447 (1989). Different courts had set time limits ranging from 1½ to 72 hours. *Compare Lively v. Cullinane*, 451 F. Supp. at 1003, 1009 *with Williams v. Ward*, 845 F.2d at 387.

As a result of this approach, the issue of excessive detention in violation of *Gerstein* had been raised largely in the context of civil actions, most commonly class actions. The courts typically focused on broad systemic factors requiring the compilation of voluminous statistical and bureaucratic information. *See, e.g., Williams v. Ward*, 845 F.2d at 390-92; *Sanders v. City of Houston*, 543 F. Supp. at 697-99; *Lively v. Cullinane*, 451 F. Supp. at 1006-08; *Bernard v. City of Palo Alto*, 699 F.2d at 1024-25. Without the ability to conduct depositions and other civil discovery and with the greater constraint of criminal

speedy trial concerns, it was difficult, if not impossible, to raise the issue in the criminal context.

This Court's opinion in *McLaughlin* worked a significant change in the law by creating a presumption which shifts the burden of proof to the government when the detention exceeds 48 hours. The Court recognized that this was a very different and more simplified approach.

> Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable cause determinations must be "prompt." This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations. (Citations omitted.)
>
> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment.

*Id.* at 1669-70. The Court then went on to establish a bright-line rule that detentions of up to 48 hours prior to a probable cause determination were presumptively valid and that the burden would shift to the government to demonstrate "a bona fide emergency or other extraordinary circumstance" if the delay exceeded 48 hours. *Id.* at 1670.

The creation of such a bright-line rule and burden-shifting presumption changed the law in a way which is critical in a criminal case. With such a presumption, a party does not need extensive civil discovery and more relaxed civil time constraints to effectively raise and litigate the issue. Rather, a defendant who is detained for more than 48 hours may rely on the presumption alone. This is a change in the law which, given the more than 60-hour delay in the present case, might – indeed, would –



"have materially altered the result", *Hormel v. Helvering*, 312 U.S. at 559.

Further, Mr. Alvarez raised his *McLaughlin* argument at the first opportunity – in his brief in opposition to the government's petition for writ of certiorari. *Compare Steagald v. United States*, 451 U.S. 204, 211 n.5 (1981) (even though decision on which government sought to rely had issued, it did not oppose certiorari on new ground). In the courts below, moreover, Mr. Alvarez did challenge the admissibility of his confession on the basis of the delay in arraignment; he simply challenged it under 18 U.S.C. § 3501 rather than on a fourth amendment theory. *Cf. Anderson v. United States*, 417 U.S. 211, 217 n.5 (1974) (noting that petitioners did challenge admissibility of testimony on some grounds); *United States v. Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (describing defendant as simply "recrafting his arguments on appeal to fit within [intervening] decision's framework"). Given these circumstances, this Court should either consider the *McLaughlin* issue itself or remand for the court of appeals to consider the issue.

### C. The Good Faith Exception Does Not Preclude Application Of The Exclusionary Rule In The Present Case.

In *Illinois v. Krull*, 480 U.S. 340 (1987), this Court recognized a good faith exception which precludes application of the exclusionary rule when a law enforcement officer conducting a search or seizure reasonably relies upon a statutory provision which is only later held to be unconstitutional. *See id.* at 349-55. The Court extended *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good faith exception to the exclusionary rule when a law enforcement officer reasonably relies upon a search warrant issued by a magistrate, *see id.* at 922. The

test is the objective one of what a reasonably well-trained officer would have believed. *See Krull*, 480 U.S. at 355; *Leon*, 468 U.S. at 922-23 & n.23.

In the present case, the officers who arrested and held Mr. Alvarez claimed to rely on a California statute. *See* Pet. App. 57a. In its reply to Mr. Alvarez's brief in opposition to the petition for writ of certiorari, the government argued that this makes the *Krull* good faith exception applicable. *See* Reply Brief for the United States, at 8 n.3. *Krull* does not save the government, however, for three reasons.

**1. Non-compliance with statutory requirements.**

California Penal Code § 825 is the statute upon which the state officers apparently relied. It provides: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; . . . . " *Id.* The California courts have held that the inclusion of the two-day limit in addition to the general prohibition against "unnecessary delay" "does not mean that any delay is reasonable so long as the 48-hour maximum limitation period has not been reached." *People v. Williams*, 68 Cal. App. 3d 36, 43, 137 Cal. Rptr. 70 (1977). The delay must be necessary. *People v. Thompson*, 27 Cal. 3d 303, 329, 165 Cal. Rptr. 289, 611 P.2d 883 (1980).

Further, delay for the purpose of investigation and, in particular, for interrogation of a defendant is a form of unnecessary delay which is not permissible under the statute. *See People v. Powell*, 67 Cal. 3d 32, 60, 59 Cal. Rptr. 817, 429 P.2d 137 (1967); *Matter of Michael E.*, 112 Cal. App. 3d 74, 79, 169 Cal. Rptr. 62 (1980). The permissible reasons for delay include only the time needed:



> [T]o complete the arrest; to book the accused; to transport the accused to court; for the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.

*People v. Thompson*, 27 Cal. 3d at 329, *quoting People v. Williams*, 68 Cal. App. 3d at 43.

Here, the record reflects that the delay was not for one of the "necessary" purposes under Penal Code § 825. One of the local officers indicated that the district attorney had already declined prosecution. Pet. App. 54a. Another claimed that the case was never presented to the district attorney and would have been presented only if the Secret Service decided not to prosecute. Pet. App. 59a. In any event, the sole reason for at least some of the delay was to permit the Secret Service to interrogate Mr. Alvarez. This is precisely the sort of delay which is "unnecessary" under Section 825.

As a result, the good faith exception established in *Krull* does not apply. For an officer to rely on the exception, he must comply with the statute upon which he claims to be relying. Here, the officers did not do that.

**2. Permissive nature of statute.**

*Krull* is also inapplicable because California Penal Code § 825 is a different type of statute than the statute in *Krull*. Assuming *arguendo* that Section 825 permits delay for reasons such as those in the present case, it is a permissive statute which *allows*, but does not *require*, such delay. The statute at issue in *Krull*, in contrast, imposed a *duty* to conduct administrative searches and provided no ready alternative. *See Krull*, 480 U.S. at 350 (referring to "an officer who has simply fulfilled his *responsibility* to enforce the statute as written" (emphasis added)).

The distinction between permissive and mandatory statutes is highly significant in its implications for the relative costs of the exclusionary rule. The main rationale for the rule is deterrence of police misconduct; it "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, . . . . '" *United States v. Leon*, 468 U.S. at 906 (*quoting United States v. Calandra*, 414 U.S. 338, 348 (1974)). The Court has indicated that in considering exceptions to the exclusionary rule, it will weigh the costs and deterrent effect of the rule in a particular context. *See Leon*, 468 U.S. at 908-13.

The cost of an officer not relying upon statutes such as those at issue in *Krull* is that in some instances a statute later held to be constitutional will not have been enforced. As the Court recognized with respect to substantive criminal statutes in *Michigan v. DeFillipo*, 443 U.S. 31 (1979): "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Id.* at 38. Society is not so ill-served when an officer simply declines to rely on a permissive statute, for the only "harm" is that the suspect will receive the constitutional rights which he is due more quickly than may have been required.[17]

Such a qualitative difference in costs suggests that the *Krull* good faith exception to the exclusionary rule

---

[17] In the present case, it may not have been possible for the officers to bring Mr. Alvarez to court on the weekend if the county had not created that option in response to the *Bernard v. City of Palo Alto* decision, discussed *infra* pp. 43-44. It is questionable whether the county's intransigence in this respect should constitute an excuse; however, the Court need not consider this. Mr. Alvarez was held into the late morning of a weekday when the courts would have been in session.



should not apply to permissive statutes such as that in the present case. There is no significant cost to non-reliance upon a permissive statute. And there is a potential gain – in the form of (1) not encouraging legislative and/or law enforcement reliance upon "grace periods" for statutes of questionable validity; (2) not discouraging defendants from challenging such statutes' validity; and (3) reducing litigation over the question of how much law an officer must know. *See generally Krull*, 480 U.S. at 366-69 (O'Connor, J., dissenting). In the case of *permissive* statutes for which the countervailing costs of non-reliance are minimal, these benefits tip the balance the other way, and the *Krull* good-faith exception should not apply.

**3. Unreasonable reliance on statute.**

Even were the good faith exception to be extended to permissive statutes, there is no basis here for a finding of good faith. Several years prior to the arrest of Mr. Alvarez, a county regulation which tracked and sought to implement the California Penal Code prompt arraignment provisions had been invalidated in *Bernard v. City of Palo Alto*, 699 F.2d 1023 (9th Cir. 1983). The *Bernard* court ruled that the California procedures fell short of fourth amendment requirements and affirmed a district court ruling limiting the maximum permissible detention in Santa Clara County to 24 hours. *See id.* at 1025. After *Bernard*, therefore, a reasonable officer would have known that there are fourth amendment constitutional requirements which limit California Penal Code § 825. *Compare State v. White*, 97 Wash. 2d 92, 103-04, 640 P.2d 1061 (1982) (no good faith reliance on substantive statute where comparable statute had been ruled void for vagueness) *with United States v. Peltier*, 422 U.S. 531, 540-42 (1975) (exclusionary rule inapplicable where officer relied

upon "a validly enacted statute, supported by longstanding administrative regulations *and continuous judicial approval*" (emphasis added)).[18]

*Bernard* did not clearly establish, however, that the 24-hour limit adopted in that case was the maximum period of detention permissible in Los Angeles County, where Mr. Alvarez was arrested. As had other courts before *McLaughlin*, *see supra* p. 37, the court in *Bernard* emphasized the particular circumstances of the county and agencies which were the defendants in that case. *See Bernard*, 699 F.2d at 1024-25.

A reasonable officer thus may not have been certain that holding a suspect in Los Angeles County for as long as Mr. Alvarez was held violated the fourth amendment. But a reasonable officer would have known that there was a strong likelihood he was violating the fourth amendment; he would have entertained serious doubts about the constitutionality of his actions and been conscious of a substantial risk that he was violating Mr. Alvarez's rights. Such a state of mind is what is commonly characterized as "recklessness" or "reckless disregard". *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974); *Model Penal Code* § 2.02(2)(c) (1985).

---

[18] While not explicitly stating such a proposition, this Court's decisions implicitly recognize that a reasonable officer would have knowledge of the basic case law governing his conduct. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("a reasonably competent public official should know the law governing his conduct"). As Professor LaFave has noted, the question is "what kind of error . . . would be made by a reasonable officer who had been reasonably trained in the law." 1 W. LaFave, *Search and Seizure* 62 (2d ed. 1987). In the fourth amendment context, this must include case law, for there is little or no statutory law. *Munz v. Ryan*, 752 F. Supp. 1537, 1543 (D. Kan. 1990).



The Court in *Krull* and *Leon* did not address this "in between" state of mind – where a reasonable officer would neither know with certainty his actions were *not* constitutional nor sincerely believe they *were* constitutional. Instead the Court expressed the test in both an affirmative and negative fashion. In *Krull*, the Court enunciated the test as whether "a reasonable officer should have *known* that the statute *was unconstitutional*", *id.* at 355 (emphasis added), but also quoted a description of the test in *Leon* as whether officers "cannot reasonably *presume* [the warrant] to *be valid*", *Krull*, 480 U.S. at 355 (*quoting Leon*, 468 U.S. at 923 (emphasis added)). In *Leon* the Court described the test in both ways also, stating it first as whether officers "acted in the objectively reasonable *belief* that their conduct *did not violate* the Fourth Amendment", *Leon*, 468 U.S. at 918 (emphasis added), but then as "whether a reasonably well trained officer would have *known* that the search *was illegal* despite the magistrate's authorization," *id.* at 922 n.23 (emphasis added). In the companion case to *Leon*, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the Court appeared to expressly leave the middle ground of recklessness open; it stated that it was not deciding the issue of "[w]hether an officer . . . who has unalleviated concerns" may rely on the good faith exception. *Id.* at 989 n.6.[19]

The Court's treatment of reckless disregard in other contexts, however, compels a holding that the good faith exception does not apply when a reasonable officer would be acting in reckless disregard of constitutional rights. In *Leon*, the Court held that *Franks v. Delaware*, 438

---

[19] There is a similar omission in the Court's qualified immunity civil rights cases, which use the same test as the good faith exception cases. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

U.S. 154 (1978) precludes application of the good faith exception when the affiant provides information which he "would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923. The Court noted in *Franks* that, while information in an affidavit need not be " 'truthful' in the sense that every fact recited . . . is necessarily correct", "surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165. Similarly, an officer who relies upon a statute must "believe or appropriately accept" it to be valid.

Extending the good faith exception to situations in which a reasonable officer would be acting with reckless disregard for a suspect's constitutional rights would also conflict with this Court's holding in the qualified immunity case of *Smith v. Wade*, 461 U.S. 30 (1983). In *Smith*, the Court held that a governmental official's qualified immunity did not preclude an award of punitive damages when the official acted with "reckless or callous disregard for the plaintiff's rights." *Id.* at 51. The standard for qualified immunity in the civil rights context is identical to the standard for the good faith exception. *See Malley v. Briggs*, 475 U.S. 335, 344 (1986).

The purpose underlying the exclusionary rule and the good faith exception also suggests that what would have been reckless disregard for constitutional rights[20]

---

[20] Since the good faith exception incorporates an objective test, the question is not whether the officer was subjectively aware of a substantial risk that he was violating a suspect's rights; rather, the test must be the objective one of whether a reasonable officer would have been aware of a substantial risk that he was violating the suspect's rights. This objective standard has the benefit of avoiding the "grave and fruitless misallocation of judicial resources" which would arise from



should not be viewed as coming within the good faith exception. As recognized in *Leon*:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

*Leon*, 468 U.S. at 919 (*quoting United States v. Peltier*, 422 U.S. at 539).

There is no "complete good faith" where a reasonable officer would be consciously aware of a substantial risk that he is violating constitutional rights. *Accord* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412-13 (1977) ("the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the *possibility* of illegality" (emphasis added)), *quoted in Leon*, 468 U.S. at 920 n.20. In these circumstances, a reasonable officer would know there is a correspondingly substantial risk that the evidence he develops through his actions is subject to suppression. *Compare Peltier*, 422 U.S. at 542 (no deterrent effect when lower courts consistently upheld statute). This will make officers more careful in this context, just as the reckless disregard standard makes officers more

---

"sending state and federal courts on an expedition into the minds of police officers." *Leon*, 468 U.S. at 922 n.23 (*quoting Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

careful about the statements in their search warrant affidavits.

A secondary purpose of the exclusionary rule will also be advanced. There has been a recognition by the Court that at times a concern for judicial integrity also underlies the exclusionary rule, at least in "unusual circumstances". *Leon*, 468 U.S. at 921-22 n.22; *see also id.* at 976-78 (Stevens, J., dissenting). This rationale is particularly significant in a case involving reckless disregard of court decisions which raise doubts about a statute's constitutional validity. Such reckless disregard shows a lack of concern both for the Constitution and the judicial system which through its decisions has created the grounds for doubt. *Cf. Franks v. Delaware*, 438 U.S. at 165 ("it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment").

While there is a burden on the officer in the field to know and apply certain basic constitutional principles to statutes, this is not a function of how the Court treats reckless disregard. Even if the Court were to treat bad faith as requiring that a reasonable officer *know* a statute is unconstitutional, it would be requiring an officer to know and apply legal principles. *See Krull*, 480 U.S. at 367 (O'Connor, J., dissenting). Judging whether there is a strong likelihood that conduct is unconstitutional requires no more or less legal sophistication than judging whether the conduct is definitely unconstitutional; the only difference is in where the officer must draw the line.

The way in which to minimize the legal sophistication required of officers in the field is by requiring that the legal principles officers must know be "clearly established". *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987);



*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In the present case, there was a clearly established legal rule at the time Mr. Alvarez was arrested: California Penal Code § 825 was limited by more stringent fourth amendment requirements, the stringency of which depended upon the particular jurisdiction's circumstances. The only thing which was not clear was the factual findings a court might make when presented with a particular jurisdiction's circumstances.

The bottom line as to "good faith" is this. Any reasonable officer would have known – in light of the clearly established law existing at the time – that he was walking a fine line between constitutional and unconstitutional conduct. When a reasonable officer would know this and acts despite the risk, he should not be permitted to cry "good faith" when it turns out he has stepped over the line, especially when he is merely taking advantage of a permissive statute.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,
MARIA E. STRATTON
Federal Public Defender

CARLTON F. GUNN
Senior Deputy Federal Public Defender

January 1994